U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 April 2003

CASE NO. 2002-LHC-1826

OWCP NO. 07-160342

IN THE MATTER OF

LLOYD LECOMPTE, JR.,
Claimant

v.

NORTH AMERICAN FABRICATORS, INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN.,
Carrier

APPEARANCES:

David B. Allen, Esq.
On behalf of Claimant

Anne D. Keller, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING LIMITED BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Lloyd LeCompte (Claimant) against North American Fabricators, Inc., (Employer) and Signal Mutual Indemnity Assn. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of

Administrative Law Judges for a formal hearing. The hearing was held on January 27, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced four exhibits, which were admitted, including: a claim by Terrebonne General Medical Center for $600.46; prescription drug costs; a medical bill from Louisiana Brain and Spine Clinic; and a report by Dr. William Kinnard dated January 22, 2003. Employer filed two exhibits, which were admitted, consisting of an accident report and a medical authorization signed by Claimant. The parties submitted twenty-three joint exhibits, which were admitted, including: various Department of Labor filings; Claimant's choice of physician statement; the medical records of Drs. Robert Davis, John Sweeney, William Kinnard, Thomas Donner, Jerry Levine, Del Walker, Bruce Guidry, and Christopher Cenac; the depositions of Drs. Robert Davis and John Sweeney; medical records from Terrebonne General Medical Center, ISR Physical Therapy, Physicians Surgical Speciality Hospital, Southern Orthopaedics and Sports, Inc., and Chabert Medical Center; a functional capacity evaluation by Billy Naquin; a vocational rehabilitation report of Carla Syler; Employer's records of Claimant's work history; and a statement of Claimant's income from April, 2000 to April, 2001.[1] After the formal hearing Claimant submitted a second deposition of Dr. Kinnard, and Employer submitted Claimant's medical file from United Health Care and the deposition of Dr. Donner, all of which are admitted in to evidence.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on April 17, 2001, in the course and scope of employment during an employer-employee relationship;

2. Employer was advised of the injuries on April 17, 2001;

3. Employer filed a notice of controversion on May 8, 2001;

4. An informal conference was held on November 14, 2001;

5. Employer paid medical benefits in the amount of $8,555.51; and

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer's exhibits- EX __, p.__; Joint exhibits - JX __, p. __; Administrative Law Judge exhibits- ALJX __; p.___, joint exhibits - JX ___, p. ___.

6. Claimant's average weekly wage at the time of his injury was $716.40.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of Claimant's disability;

2. Claimant's entitlement to past and future compensation benefits;

3. Claimant's entitlement to past and future medical benefits

4. Claimant's choice of physician; and

5. Attorney fees, penalties, interest, and costs.

III. STATEMENT OF THE CASE

A. Chronology

Claimant testified that he was born on January 18, 1964, had an eighth grade education, and was a life long resident of Terrebonne Parish, Louisiana. (Tr. 22-24). After leaving school, Claimant began working for his father as a carpenter, and he performed carpentry for twenty-years before Employer also hired him as a carpenter. (Tr. 24).

In 1996, Claimant suffered a back injury that necessitated an MRI, which demonstrated one bulging and one protruding disc. (JX 4, p. 18). Following that injury, Claimant was able to return to work at full duty, but on April 17, 2001, Claimant suffered a second back injury and an MRI revealed that Claimant's bulging disc was unchanged, but his protruding disc was slightly larger. *Id*. at 106. Following the accident, Claimant testified that he suffered from back and lower extremity pain, and he was treated conservatively by Employer's physician, Dr. Davis. (JX 5). In an April 20, 2001 meeting with Employer's representative, Claimant signed a choice of physician form naming Dr. Davis as his treating physician, but Employer's representative simultaneously told Claimant that he could treat with a physician of his choice if he did not like Dr. Davis. (Tr. 40-42, 160-62).

Thereafter, Claimant became dissatisfied with Dr. Davis' treatment, and he began treatment with Dr. Kinnard. (Tr. 55-57). Dr. Kinnard diagnosed Claimant as having nerve root irritation and recommended that Claimant not engage in any work. (JX 7, p. 14; JX 22, p. 18). No other physician in the record seriously credited Dr. Kinnard's diagnosis, and Employer controverted Claimant's compensation on May 8, 2001, on the basis that two physicians had recommended Claimant could

return to light duty work, Employer had made light duty work available, and Claimant had refused to return to work. (JX 2).

B. Claimant's Testimony

Claimant related that he suffered a previous back injury after lifting a lawn mower and after having a motor vehicle accident. (Tr. 45). Following his lawn mower lifting injury, Claimant sought treatment with Dr. Cenac who informed him that he had an old man's back. (Tr. 46). Following his auto accident, Claimant treated with Dr. Kinnard, but Claimant did not follow through on Dr. Kinnard's recommendation for epidural steroid injections, because he was uninsured and could not afford the treatment. (Tr. 47). Eventually, Claimant just went back to work, and resumed work at full force after six months. (Tr. 47-48). Claimant related that his current symptoms were different than those he suffered following his 1996 lawn mower lifting accident and motor vehicle accident in that he was still symptomatic. (Tr. 82-83).

Claimant's job as a carpenter entailed carrying tools to a vessel, obtaining materials from the yard, performing framing, building cabinets, bunk beds, pantries, hanging ceilings, and other types of general carpentry work. (Tr. 26). The job required Claimant to lift between five and eighty or more pounds. (Tr. 26). Regarding his April 17, 2001 workplace accident, Claimant testified that he was repairing some flooring on a crew boat and during the process he descended down a fixed ladder, lost his footing, and hit his tail on the edge of the hatch. (Tr. 30-32). Claimant immediately felt a sharp pain in his back, numbness and tingling in his legs, and he was unable to return to work. (Tr. 32-33). A medic eventually came, and Claimant was transported to Terrebonne General for treatment. (Tr. 33-34). At the hospital, Claimant met Dr. Davis, for the first time, and he related that he continued to see Dr. Davis at the direction of Employer. (Tr. 34-35).

Although Claimant knew he had medical clearance to resume light duty, he did not report back to work because he was in pain. (Tr. 37). About three days after his accident, Claimant went back to Employer's facility where he met with Mr. Fortenberry, the yard supervisor, to sign an accident report. (Tr. 39-40). Claimant signed Employer's draft of the accident report, and underneath the accident report Claimant signed a document, without reading it, that he understood was "recent information from Dr. Davis to [Employer]." (Tr. 40-41). Claimant testified that no one told him he was choosing Dr. Davis as his treating physician. (Tr. 42). Nevertheless, Claimant returned to Dr. Davis three days after the accident because he needed medical attention, and he did not have any other physician in mind at the time. (Tr. 88). After seeing Dr. Davis and Dr. Sweeney, Claimant decided that he needed to see his "own" doctor,[2] and he chose to see Dr. Kinnard because Dr. Kinnard had treated him on prior occasions. (Tr. 55). Claimant did not feel comfortable seeing Dr. Sweeney because he was in the same office suite as Dr. Davis, and he felt they were too closely

[2] Claimant felt that he needed another physician because Dr. Davis told him his bruise had cleared up and resolved. Claimant stated that he had never suffered from a bruise, and he did not know that Dr. Davis was referring to an internal bruise as opposed to a black and blue bruise. (Tr. 52). This event caused Claimant to lose all confidence in Dr. Davis. (Tr. 52).

associated. (Tr. 99). Employer, however, refused to pay for treatment by Dr. Kinnard, and Claimant had to pay the medical bill himself.[3] (Tr. 56-57). Regarding his physical therapy sessions and his epidural injections, Claimant stated that they did not improve his pain symptoms. (Tr. 58-59).

Following his workplace injury, Claimant testified that Employer offered him a light duty position in the tool room handing out tools to workers. (Tr. 90). Claimant testified that he did not think he would be able to perform that job because he was in pain and did not think he could stand, bend and twist in the tool room. (Tr. 90). Claimant explained the discrepancy between his functional capacity evaluation, which indicated that he could walk continuously, and the statement in his deposition that he had difficulty walking fifty-percent of the time by stating that he was having a good day when he took the functional capacity examination and the test was performed on a treadmill. (Tr. 92-93). Following each day of the examination, Claimant stated that he was tired out, his back hurt, his legs were giving him trouble, and he had to lay down in bed. (Tr 128-29).

On a daily basis, Claimant fixed coffee, woke up his children up, prepared their lunches, and after his spouse and children left, he would lay back down. (Tr. 67). Claimant's level of pain was not always the same, and he had both good and bad days. (Tr. 67). On good days, Claimant washed dishes, did laundry, cooked, wheeled the garbage to the curb, and he could stand in one place up to twenty-minutes. (Tr. 69-70). Claimant estimated that he could walk up to eight minutes at a time traveling one mile per hour. (Tr. 139). Claimant was no longer receiving over the counter medications, but he was taking extra strength Tylenol and Tylenol PM at night. (Tr. 70). Claimant did attempt to return to work following his workplace accident as a pilot of a trolling boat. (Tr. 122). After three and a half days, Claimant made $400.00 but he could not tolerate the rocking of the eighty-foot boat in the Gulf of Mexico. (Tr. 122-23). The rocking sent shocking pains through his back. (Tr. 123). Claimant also took a job for his father constructing a fireplace mantel, which he completed in two days and he earned $300.00. (Tr. 124). Claimant's normal wage while working for his father as $17.00 per hour, but his father was generous in paying him. (Tr. 142). Claimant was only able to work three hours each day on the fireplace, and he took the rest of the week off. (Tr. 124-25, 142). Claimant testified that he could not return to work as a carpenter because he could not perform the lifting, and he could not work from a crouching position. (Tr. 27). Although Claimant testified that he still had back pains and his legs were giving him problems, he stated at the formal hearing that he was feeling better with the passage of time. (Tr. 66). Nonetheless, Claimant felt that he had reached a plateau, and his condition was largely unchanged for the past year. (Tr. 67).

C. Testimony of Angel LeCompte

Ms. LeCompte, Claimant's spouse, testified that she married Claimant in 1993, and she began to work outside of the home following Claimant's back injury in 1996. (Tr. 154). Following Claimant's 1996 lawn mower back injury and car accident, Ms. LeCompte related that Claimant was

[3] Employer eventually paid all the medical bills of Claimant associated with Dr. Kinnard's treatment. (Tr. 178).

off from work for a period of several months, but Claimant did resume full duties working as a carpenter for his father. (Tr. 158).

A few days after Claimant's April 17, 2001 workplace injury, Ms. LeCompte testified that she was present at a meeting with Employer during which Charles Fortenberry and Chris Vandercamp asked Claimant to review and sign an accident report. (Tr. 160-61). Underneath the accident report was a document that Ms. LeCompte thought was for the purpose of releasing information so that Employer could track Claimant's medical care. (Tr. 161). Ms. LeCompte testified that she held this belief because that's what Employer told Claimant the purpose of the document was. (Tr. 162). Ms. LeCompte specifically asked Mr. Fortenberry what would happen if Claimant chose to see his own doctor other than Dr. Davis, and Ms. LeCompte understood that Claimant could choose another physician if he desired. (Tr. 162).

D. Exhibits

(1) Medical Records form Terrebonne General Medical Center (TGMC)

On January 11, 1995, Claimant presented to TGMC with an obvious deformity to his left forearm, and Claimant also complained of neck pain. (JX 4, p. 3). Claimant was issued prescription medication, a sling, he was instructed not to work or drive, and Claimant made an appointment for follow-up treatment with Dr. Levine. *Id*. at 4.

On July 30, 1996, Claimant presented to TGMC complaining about back pain. (JX 4, p. 8). Claimant was diagnosed as having a back strain, was issued lifting restrictions, and was told to follow-up with Dr. Cenac. *Id*. at 10. On August 7, 1996, Claimant underwent an MRI which demonstrated: a degenerative disc with central protrusion at L3-4; and an annular bulge at L4-5. *Id*. at 18.

On October 5, 2000, Claimant presented to TGMC complaining about left shoulder pain. (JX 4, p. 19). Claimant alleged that the injury occurred while he was sleeping and a physical exam revealed tenderness around the bursa region. *Id*. at 25. Claimant was assessed as having an acute left shoulder strain, and was discharged in stable condition with a sling. *Id*. at 21-22, 25. A radiological report of Claimant's left shoulder demonstrated that the shoulder joint was intact, and the report noted a small calcification adjacent to the distal tip of the clavicle representing an old fracture injury that had not united. *Id*. at 26. On October 8, 2000, Claimant returned to the TGMC complaining that his pain had become worse. *Id*. at 29. Claimant's assessment was unchanged, a second radiographic report did not note any changes, and Claimant was instructed to continue wearing his sling. *Id*. at 30-31. When Claimant returned on October 19, 2000, an MRI of his left shoulder showed: considerable pannus formation and deformity of the distal clavicle secondary to an old healed fracture that was creating a prominent impingement syndrome; and a small amount of fluid in the subacromial bursa with no indications of a rotator cuff tear. *Id*. at 34. Claimant consented to left shoulder surgery consisting of Mumford and acromioplasty. *Id*. at 38. Dr. Kinnard performed

the surgery on November 1, 2000, with the final diagnosis of left shoulder impingement syndrome and acromioclavicular joint arthrosis. *Id*. at 40.

On April 17, 2001, Claimant returned to TGMC complaining of low back and lower extremity pain. (JX 4, p. 94). Claimant alleged that he had slipped and fell at work injuring his tail bone and lower back, and Claimant was assessed as having a contusion to his coccyx and lower back. *Id*. at 97. X-rays demonstrated normal findings for Claimant's lumbar spine and normal findings for his sacrum and coccyx. *Id*. at 99. On May 1, 2001, Claimant returned to TGMC continuing to complain of lumbar pain, and hospital staff assessed Claimant as having a lumbar contusion/spasm. *Id*. at 103. An MRI of his lumbar spine demonstrated: a central disc protrusion at L3-4 which was slightly increased in comparison with his August 7, 1996 MRI; and an annular bulge that was unchanged from his earlier MRI. *Id*. at 106. On May 21, 2001, Claimant presented to TGMC again complaining of low back pain. *Id*. at 107. On April 17, 2002, Claimant also complained of low back pain, but x-rays did not reveal any abnormalities in Claimant's lumbar spine. *Id*. at 117, 124.

(2) Medical Records and Deposition of Dr. Robert Davis

On April 20, 2001, Claimant presented to Dr. Davis, board certified in family medicine and medical management, and board eligible in industrial medicine, complaining about localized lower back pain. (JX 5, p. 3; JX 20, p. 30-31). After conducting a physical exam, Dr. Davis diagnosed low back pain as part of a contusion injury. (JX 5, p. 3). Dr. Davis also limited Claimant to sedentary work until he could be re-evaluated in one week. *Id*. Dr. Davis noted that Claimant's physical exam was slightly inconsistent in that Claimant demonstrated the ability to flex from forty to fifty degrees at the lumbosacral joint, but his straight leg raises were negative. (JX 20, p. 11). On April 26, 2001, Claimant continued to complain of pain, he demonstrated a positive Patrick's sign on the right that was not present before, and Dr. Davis stated that the etiology of Claimant's back pain was uncertain, and he wanted an MRI to help discern the source of Claimant's pain. (JX 5, p. 4). Dr. Davis limited Claimant to light duty status until he could reevaluate Claimant after completion of his MRI. *Id*. Dr. Davis also directed Claimant to undergo physical therapy. *Id*.

On May 1, 2001, Claimant continued to complain of pain, and Dr. Davis noted that Claimant's Patrick's sign was normal. (JX 5, p. 5). Reviewing Claimant MRI taken on that day, Dr. Davis noted that there was disc degeneration and desiccation, but no evidence of any significant spinal stenosis or neuroforminal impingement. *Id*. Dr. Davis opined that Claimant's back pain was likely muscular in origin although Claimant did have a degenerative history. *Id*. Specifically, Dr. Davis stated:

> Let's assume that in '96 you know, he had a problem which obviously warranted an MRI, and in '96, they did reveal some degree of protrusion at L3-4. Frequently what happens is is (sic) that when there is some degree of injury to a disc, the disc itself cracks, if you will, a little bit and leaks, and it begins a drying process called desiccation. When that process continues, it allows the disc to get smaller in such a manner that movement of the disc is more feasible.

> So the way in which I interpret this is that the slight increase of the protrusion may, in fact, be due to the desiccation in and of itself that allows for more slippage, more flattening, if you will, of the disc. That could be one plausible explanation of that. There may be others, but that's the way I would view that.

(JX 20, p. 24-25).

On May 1, 2001, Dr. Davis recommended continued physical therapy, he referred Claimant to Dr. Sweeney, and he maintained Claimant's light duty status. (JX 5, p. 5). Dr. Davis also noted that Claimant was able to move about from the chair to the table exhibiting a deviation from patients who have acute lumbar problems. (JX 20, p. 25-26).

Dr. Davis acknowledged that a board certified orthopaedist would have more knowledge and experience in orthopaedics than him. (JX 20, p. 32).

(3) Medical Records and Deposition of Dr. John Sweeney

On May 3, 2001, Dr. Sweeney, an orthopaedist, evaluated Claimant, on the referral from Dr. Davis, in an effort to treat his back pain. (JX 6, p. 1). Claimant reported his pain was about twenty percent better from the date of his workplace accident. *Id*. Reviewing Claimant's MRI report, Dr. Sweeney opined that Claimant's lumbar abnormalities apparent on his May 1, 2002 MRI possibly represented the exact findings as Claimant's August 7, 1996 MRI when allowing for a deviation based on the different techniques used in performing an MRI. *Id*. Dr. Sweeney also noted Claimant's physical therapist had recommended further treatment with a focus on consistency of effort, and he noted Claimant's previous injuries consisting of a 1996 muscle pull, shoulder surgery in November 2000, and a prior motor vehicle accident. *Id*. Dr. Sweeney diagnosed subjective back pain and recommended further physical therapy. *Id*. Dr. Sweeney found it "a bit disturbing" that Claimant had not made any improvement s in his course of physical therapy when he had no objective neuro-compressive findings. *Id*. In the meantime, Claimant was limited to light duty work. *Id*. at 6.

On September 11, 2002, Dr. Sweeney re-evaluated Claimant after reviewing the records of Dr. Kinnard and records from Claimant's three epidural steroid injections. (JX 6, p. 2). Claimant related to Dr. Sweeney that no treatment had helped him, that he continued to experience pain in his back, right buttock, and right leg. *Id*. After conducting a physical exam, Dr. Sweeney's impression was that Claimant suffered from back pain, recalcitrant and chronic, which was secondary to degenerative disc disease. *Id*. at 4. In his opinion, Claimant's subjective reports of pain were not explained by his objective pathology, which in fact did not exist at all in relation to his April 17, 2001 workplace accident. *Id*. Claimant's subjective complains were simply without an explanation. *Id*. Dr. Sweeney concluded to a reasonable degree of medical probability that Claimant did not suffer from any permanent injury related to his April 17, 2001 workplace accident. *Id*. Claimant had likely reached maximum medical improvement over a year ago, and Dr. Sweeney found no reason why Claimant could not resume his pre-injury occupation. *Id*. Reasonable restrictions based on the two degenerative discs present in Claimant's MRI would include no heavy, or very heavy, repetitive lifting

(100 lbs lift, 50 lbs carry). (JX 6, p. 2; JX 21, p. 23). There was no orthopaedic condition related to his workplace accident that needed further diagnostic treatment or testing. (JX 6, p. 5).

In his deposition, Dr. Sweeney related that Claimant's lumbar disc pathology could explain his back pain, but Dr. Sweeney did not have any answer as to what was causing Claimant's leg symptoms. (JX 21, p. 20). Likewise, the fact that Claimant complained that his knees were buckling was a subjective complaint without any objective explanation as to why it was occurring. *Id*. at 21. Dr. Sweeney did not feel that Claimant suffered from a general nerve irritation as explained by Dr. Kinnard. *Id*. at 28. Specifically, the MRI findings did not show any contact or physical compression of the nerve roots, Dr. Sweeney's two physical examinations did not reveal any findings consistent with irritated nerves or nerves in tension, and Claimant's subjective history of complaints was too persistent to indicate general nerve irritation. *Id*. at 39-40. Also, if Claimant truly had radicular complaints, such as buckling knees, Dr. Sweeney testified that he would have expected to see some asymmetry in the thighs and calves as well as positive tension, reflex and neurological signs. *Id*. at 40.

Based on the chronology of events, Dr. Sweeney stated that Claimant's subjective complaints of low back pain began on the date of his workplace accident. (JX 21, p. 43). He also stated that asymptomatic degenerative discs could be rendered symptomatic by a traumatic event. *Id*. at 45.

(4) Medical Records and Depositions of Dr. William Kinnard

On September 12, 1996, Dr. Kinnard, an orthopaedist, treated Claimant in relation to neck and back complaints Claimant suffered due to a January, 1996 motor vehicle accident. (JX 22, p. 5). Dr. Kinnard related that Claimant had a cervical strain, and he knew that Claimant had evidence of a lumbar disc protrusion as depicted in an August 1996 MRI. *Id*. at 5-6. Claimant's pain diagram followed a somatic pattern, meaning that Claimant could be suffering from nerve root irritation as opposed to a nerve root injury. *Id*. at 7. Claimant physical exam revealed that straight leg raises did not aggravate Claimant's lumbar nerves. *Id*. at 9. Claimant presented to Dr. Kinnard a second time on September 26, 1996, continuing to complain of neck and lower back pain. *Id*. at 11. Dr. Kinnard opined that Claimant was neurologically intact, that Claimant had some evidence of muscle spasm, and he recommended epidural steroid injections. *Id*.

On April 30, 2001, and again on June 13, 2001, Claimant filled out a pain diagram for Dr. Kinnard, and after reviewing Claimant's two pain pattern diagrams, Dr. Kinnard stated that there were some minor variations, but nothing to make him think that Claimant was psychologically unstable. (JX 22, p. 17-18). The diagrams more closely resembled a nerve root irritation rather than a nerve root injury. *Id*. at 18. Pain associated with nerve root irritation would vary from day to day. *Id*. Claimant's nerve root irritation could be due to either to Claimant's lumbar disc protrusion or due to the injury itself. *Id*. at 19. Dr. Kinnard testified that there was no way to determine which caused Claimant's pain complaints. *Id*. at 19-20. Typically, a nerve root irritation would resolve over time. *Id*. at 20. Also, Dr. Kinnard testified that Claimant's somatic nerve irritation would not actually

cause his legs to go numb or his knees to go weak because Claimant did not have a true neurologic injury. (CX 5, p. 25). Rather, Dr. Kinnard attributed that complaint to a reflexive response to a painful stimuli. *Id*. Dr. Donner's statement that Claimant did not have a neurologic basis to his pain component was correct, but there mere many components involved apart from Claimant's neurologic system. *Id*. at 26. Dr. Donner was also correct in stating that Claimant had no radicular referral of pain from his back, but Claimant did have a somatic referral from a vague nerve irritation. *Id*. at 28. Somatic referral was pain, and Dr. Kinnard would not expect to see any outward physical findings such as asymmetry in the thighs. *Id*. at 34.

On June 13, 2001, Dr. Kinnard, evaluated Claimant in relation to his low back pain. (JX 7, p. 13). After conducting a physical exam, which revealed tenderness, limited flexion, and evidence of spasm, and reviewing Claimant's 1996 and 2001 MRIs, Dr. Kinnard concluded that Claimant suffered from an aggravation of a pre-existing condition as well as a worsening of that condition in his lower back. *Id*. at 14. In regards to further treatment, Dr. Kinnard recommended an epidural steroid injection to see if it decreased Claimant's level of pain. *Id*. Until the shot could be administered, Dr. Kinnard recommended that Claimant not return to work. *Id*.

On June 28, 2001, Dr. Kinnard noted that an epidural steroid block did not provide Claimant with any relief, thus, Dr. Kinnard recommended a series of blocks so that Claimant could attain the maximum effect. (JX 7, p. 16). On July 26, 2001, Dr. Kinnard remarked that Claimant had three epidural steroid blocks, but none of the blocks had provided any relief. *Id*. Due to Claimant's failure to respond to treatment, Dr. Kinnard recommended physical therapy and referred Claimant to Dr. Tom Donner, a neurosurgeon, for a second opinion concerning treatment options. *Id*.

On November 14, 2001, Dr. Kinnard wrote to Claimant that he had not seen him for treatment since July 26, 2001, and he could not justify keeping Claimant in a no-work status. (JX 7, p. 19). Thus, Claimant presented for treatment on November 29, 2001, and continued to complain of low back pain that was referred into both legs. *Id*. at 20. Dr. Kinnard repeated his recommendation that Claimant not return to work, and he continued his recommendation that Claimant see Dr. Donner for a second opinion. *Id*. at 20. Dr. Kinnard testified that his continuing no-work recommendation was based on Claimant's subjective reports of pain. (JX 22, p. 39).

On January 11, 2002, Dr. Kinnard noted that Claimant had seen Dr. Donner, and Dr. Donner had not recommended surgery. (JX 7, p. 23). Accordingly, Dr. Kinnard recommended further physical therapy and he referred Claimant to Dr. Haydel for pain management. *Id*. After Claimant's February 21, 2002 and March 13, 2002 office visits, Dr. Kinnard continued his recommendation for physical therapy. *Id*. at 24. On April 3, 2002, Claimant complained to Dr. Kinnard that his symptoms were becoming worse, and that he was having difficulty with his physical therapy which necessitated modifications. *Id*. at 28. Dr. Kinnard suggested that Claimant continue with his physical therapy, but he also recommended an aquatic program to allow exercises in a non-weight bearing status, and he referred Claimant to Dr. Cowan for chronic pain management. *Id*. On May 1, 2002, Dr. Kinnard noted that Claimant continued to report significant pain despite minimal physical findings and minimal

MRI findings. *Id*. at 30. Dr. Kinnard felt that Claimant had chronic lumbar pain from a questionable origin, and because he had nothing further to offer Claimant in the way of treatment, Dr. Kinnard stated that Claimant had reached maximum medical improvement with a five-percent whole body impairment. *Id*. Dr. Kinnard issued permanent work restrictions in the sedentary/light category. *Id*. On January 22, 2003, Dr. Kinnard repeated his opinion that Claimant had a five-percent permanent partial impairment rating to the body as a whole. (CX 4, p. 1). Dr. Kinnard also testified that Claimant's subjective reports of pain were out of proportion to his minimal physical findings, and he explained that Claimant's symptoms were a combination of lumbar disc disease, an L-3 disc protrusion, and a chronic lumbar strain, all of which could cause Claimant's nerve root irritation. (JX 22, p. 41-42). The sedentary/light work restrictions Dr. Kinnard set were based on Claimant's pain complaints. *Id*. at 47.

Regarding Claimant protruding disc that was apparent in his 1996 MRI, Dr. Kinnard stated that it was possible that the enlargement of that protrusion in Claimant's May, 2001, MRI was due to the passage of time and normal wear and tear of the body. (JX 22, p. 21-22). Dr. Kinnard did not think that there was a significant difference in the techniques used in Claimant's 1996 and 2001 MRI scans, and he did not think that the technique used in taking the MRIs accounted for the slight increase in Claimant's protruding disc. *Id*. at 21-22. Dr. Kinnard opined that the source of Claimant's pain was both an aggravation of a pre-existing condition and a slight increase in a protruding disc caused by Claimant's workplace fall. *Id*. at 31.

Reviewing Claimant functional capacity evaluation Dr. Kinnard stated that his sedentary/light work restrictions were consistent with the result of the functional capacity evaluation, and he did not think it was appropriate for him to further limit Claimant's work restrictions to sedentary only. (CX 5, p. 8). Dr. Kinnard did not agree with the recommendation that Claimant could perform continuous crawling, sitting, upper extremity coordination and elevated work, and he stated that he would restrict those activities more. *Id*. at 12. Likewise, Dr. Kinnard would not recommend that Claimant engage in frequent forward bending, sitting, kneeling, balancing, rotation of sitting, standing, and walking, such that Claimant should not engage in any continuous or frequent activity, but Claimant could engage in those activities occasionally. *Id*. at 13-14. Dr. Kinnard stated that he would restrict Claimant's lifting to twenty-five to thirty pounds on a regular basis, and an ideal job would allow for alternating sitting, standing, and walking. *Id*. at 34-35. Reviewing the jobs Ms. Syler identified in her labor market survey, Dr. Kinnard related that he did not approve of the job as a route salesman, but he did approve positions such as meter reader, service writer, and photo lab worker. *Id*. at 20-21. Dr. Kinnard also approved the job as an unarmed security guard with the caveat that the job had to entail minimal activities and not the apprehension of violators or trespassers. *Id*. at 21.

(5) Medical Records and Deposition of Dr. Thomas Donner

On January 7, 2002, Claimant presented to Dr. Donner, a neurosurgeon, complaining of back pain that was not alleviated by Dr. Kinnard's treatments or by physical therapy. (JX 8, p. 4). After conducting a physical exam, Dr. Donner's impression was that Claimant suffered from chronic lumbar

pain of an unknown etiology. *Id*. at 5. Dr. Donner opined that Dr. Kinnard's treatment was appropriate, and that he had nothing further to offer Claimant that Dr. Kinnard had not already attempted. *Id*. Accordingly, Dr. Donner referred Claimant to a pain management specialist for an opinion. *Id*.

Dr. Donner explained that Claimant did not have a lumbar lesion that compressed his nerve to cause radicular symptoms. (EX 3, p. 11). Claimant did not have lumbar stenosis. *Id*. Likewise, Claimant's pain was not likely referred because symptoms of leg weakness and numbness did not fit with Claimant's situation. *Id*. at 11-12. There was no way to equate any radicular symptoms in Claimant to the disc bulge apparent on his MRI. *Id*. at 12. Regarding the theory that Claimant could suffer from generalized nerve irritation, Dr. Donner stated:

> What, some evil pixie came and waved dust over him and - - it is possible. I suppose it's possible that you could have some sort of neurotic syndrome that's not related to any kind of, you know, lesion in the spine; and some people do develop fairly painful neuropathies, but you are not going to describe the onset of that during a fall. So to say that's the etiology of his leg pain, you know, isn't - - I don't think that's a valid argument to me.

(EX 3, p. 13).

Regarding Claimant workplace fall aggravating a pre-existing condition, Dr. Donner stated that bulging discs in general were a normal variant and he would not expect a fall to aggravate a bulging disc. (EX 3, p. 21). Based on Claimant's history, however, Dr. Donner thought Claimant's complaints originated with his workplace injury. *Id*. at 25. Reviewing Claimant's functional capacity evaluation, Dr. Donner thought that it reflected an ability to perform work above a sedentary level. *Id*. at 31.

(6) Medical Records of Dr. Christopher Cenac

An undated treatment note from Dr. Cenac's office, indicated that Claimant injured his back a year and a-half ago while picking up a saw. (JX 23, p. 3). Claimant related that his pain had progressively gotten worse and that he had re-injured his back at work while picking up wood. *Id*. Claimant specifically complained of lower back pain, weakness in his legs, and numbness in his feet. *Id*.

(7) Functional Capacity Evaluation Report of Billy Naquin

Claimant underwent a functional capacity evaluation on January 20 & 22, 2003, in which he gave a maximum voluntary effort, and he did not exhibit signs of symptom magnification. (JX 9, p. 1). Claimant exhibited the ability to function on a sedentary physical demand level and his body mechanics were appropriate. *Id*. Mr. Naquin summarized Claimant's functional capacities as follows:

> This client could return to sedentary level work activity. This client could perform continuous crawling, sitting, UE coordination, and elevated work. This client could perform frequent forward bending in sitting, kneeling, balance, rotation in sitting, standing and walking. This client would be limited to occasional repetitive squatting, ladder and stair climbing, forward bending in standing, crouching, and standing tolerance.

(JX 9, p. 1).

(8) Vocational Rehabilitation Report and Testimony of Carla Syler

On January 23, 2003, Ms. Syler performed a vocational rehabilitation evaluation and a labor market survey on Claimant. (JX 10, p. 1). Claimant related that he completed the eighth grade in school, and had no typing or computer experience. *Id*. at 2. After leaving school, Claimant began working as a carpenter with his father. *Id*. Claimant learned how to read blue prints and was capable of ordering materials and performing rough estimates on the amount of material needed for a task. *Id*. After a brief stint as a deck hand on a tugboat, Claimant began working for Employer as a carpenter. *Id*. Claimant worked in a vessel's hull to install the galley, pantry, bunk-beds, and state rooms. *Id*. In vocational testing administered by Ms. Syler, Claimant demonstrated the ability to identify words at a 7.5 grade equivalency, comprehend passages at a 5.1 grade equivalency, and to perform calculation at a 5.7 grade equivalency. *Id*. at 3. Using the restrictions set forth by Dr. Kinnard, Ms. Syler identified the following jobs as suitable alternative employment for Claimant:

> Schwan's Home Food Service - Route Salesman. Located in Thibodaux, Louisiana, this position paid $500.00 per week while the employee was in training, and thereafter the salesmen averaged $35,000 - $50,000 per year in commissions. The employer was a frozen food company who needed workers to drive a 7.5 ton truck approximately 100 miles per day delivering frozen foods and ice creams to residential customers, to collect payments, and to develop new customers. The worker was required to alternate sitting, standing, and walking, and had to climb in and out of the truck. A Class D Chauffeur's license was required. The worker was not required to stock the truck, and lifting was under twenty-five pounds. A small hand computer was used to record sales, and on the job training was provided.

> Acadiana Crew Change - Driver. Located in Lafayette, Louisiana, this position paid $8.50 per hour if the worker obtained a Chauffeur's license and $9.00 per hour if the worker obtained a CDL. The employer needed workers to drive oilfield personnel to appropriate destinations and to pick them up. The job required frequent sitting, and allowed for the worker to alternate standing and walking. No lifting was required and the employer would consider a person who is capable of reading and writing.

Terrebonne Parish Consolidated Government - Meter Reader. Located in the Houma, Louisiana, this position paid $7.44 per hour. The worker was required to read electric and gas meters on assigned routes and the job required frequent standing and walking. The worker was required to lean forward to read gas meters because those were not located at ground level. Lifting was under twenty pounds, and the job was completed in about four hours. The rest of the day was spend rechecking meters with extraordinary readings and checking meters per customer complaints.

Wal Mart Tire & Lube Express - Service Writer. Located in Thibodaux, Louisiana, this position paid $7.00 per hour. The job entailed meeting and greeting customers in the service department of a tire and lube retailer. The worker mostly stood, walked, and was occasionally required to lift up to eighty pounds. Training to operate the computer system was provided and the worker needed to be able to interact with the public.

Qualex - Photo Lab Worker. Located in Houma, Louisiana, this position paid $6.50 to $7.00 per hour. The job entailed operating photo processing machines to process, print and develop film. The worker also operated a cash register and provided developed film to customers. Lifting was less than ten pounds, but when stock was received once a month, the worker was required to lift up to twenty-five pounds. An ability to work with the public was required.

Vision Guard - Unarmed Security Guard. Located in the Houma area, this position paid $5.50 top $6.50 per hour. Job tasks varied depending on the worker's post, but the worker was able to sit frequently and alternate positions. The worker was also required to lift up to fifty pounds on an infrequent basis. On further inquiry, Ms. Syler learned that the job as actually performed was sedentary to light work and the worker did not actually have to lift fifty pounds. The job basically entailed checking persons who were trying to gain entrance to a yard or business.

(JX 10, p. 4-6, 11; Tr. 200).

All of the above jobs were approved by Dr. Sweeney with the exception of the unarmed security guard. (JX 10, p. 9-10). Ms. Syler testified that Claimant's job as a carpenter was classified as medium level work, and based on the medical records of Dr. Sweeney, Claimant would be able to return to his former employment, but he could not based on the restriction set by Dr. Kinnard. (Tr. 201). Based on Claimant's functional capacity evaluation, which recommended sedentary work, Ms. Syler testified that Claimant could still perform the position as a meter reader and driver for Acadiana Crew Change. (Tr. 202-03). Also, Ms. Syler stated that Claimant could still perform the position as a service writer because he could obtain help lifting batteries, and she did not think that the positions as a photo lab worker or as an unarmed security guard would be a problem for Claimant to perform. (Tr. 203).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he suffers from a permanent partial disability which prevents him from resuming his former employment and that he is entitled to permanent partial disability benefits under Section 8(c)(21). As established by Dr. Kinnard, Claimant asserts that he suffers from nerve root irritation and as a result, has a five-percent permanent impairment rating to the body as a whole. Claimant also argues that he reached maximum medical improvement on May 1, 2002, as indicated by Dr. Kinnard. Based on the jobs listed by Employer's vocational expert and the recommendation fo Dr. Kinnard, Claimant contends that he has a residual wage earning capacity of $7.75 per hour, or $310.00 per week. Finally, Claimant asserts that he is entitled to have his medical bills with Dr. Donner paid by Employer, and that he is entitled to have his emergency room visit at TGMC on May 21, 2002, paid by Employer.

Employer contends that there is no basis for determining that Claimant sustained any permanent disability as a result of his work related accident on April 17, 2001. Also, Employer asserts that Claimant is not a credible witness based on the record and the Court cannot credit his subjective reports of pain. Likewise, Employer argues that the medical reports of Dr. Kinnard are not based on substantial evidence. Based on the nature and extent of Claimant's injury, Employer contends that Claimant is able to resume his former job and thus he does not suffer from any lingering disability. Additionally, Employer asserts that it is not responsible for paying Claimant's outstanding medical bills from TGMC, prescriptions costs, and a bill from Louisiana Brain and Spine because Claimant never obtained authorization to change treating physicians to Dr. Kinnard. Likewise, Employer asserts that Dr. Kinnard's recommendation for pain management is neither reasonable nor necessary because Claimant has not sought any treatment after Dr. Kinnard released Claimant in May, 2002, and because Claimant failed to respond the pain management treatment he did receive. Finally, Employer argues that Claimant's choice of physician was Dr. Davis, and Claimant never followed the procedures in Section 7(b) of the Act to request a change to Dr. Kinnard.

B. Claimant's Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass's v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport*

News Shipping and Dry Dock Co., 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Employer asserts that Claimant was an incredible witness because Claimant was not honest in reporting his prior back complaints, and Claimant manipulated his complaints of back pain and the history of his back pain for purposes of litigation. Specifically, Employer illustrated six inconsistencies in the record:

> 1) Claimant's testimony regarding his choice of physician was inconsistent. On direct examination, Claimant testified that he continued to see Dr. Davis because that is what the company ordered him to do. (Transcript p. 52, line 24 - p. 53, line 1.) On cross-examination, however, Claimant admitted that he was not ordered to go to Dr. Davis. He admitted that he chose to return to Dr. Davis following the emergency room visit at Terrebonne General Medical Center, and, in fact, returned to Dr. Davis even prior to going to Employer's office at which time he signed the choice of physician form in selecting Dr. Davis. (Transcript, p. 84, line 12 - p. 85, line 2.)
>
> According to Claimant's testimony, he was not advised that one of the papers he signed at his Employer's office was a choice of physician form. (Transcript p. *85*, lines 18-17.) He claims that he signed the form because he thought it was a release form for the Employer to obtain information from Dr. Davis. (Transcript p. *85*, lines 19-21.) While the Claimant denies that there was any discussion about his choice of physician, he testified that at the time he signed the documents at his Employer's office, his wife asked if Claimant could see another doctor if they didn't like the one they had seen. (Transcript p. 42, lines 22-24.) Mrs. LeCompte's testimony also made it clear that Claimant's choice of physician was discussed with Claimant's Employer.[4]

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[4] Specifically, Employer illustrated the following exchange at the formal hearing during Ms. Lecompte's testimony:

> Q: Okay, did anyone tell you in the room, or did you hear anyone tell Lloyd that this paper was a selection of a [physician] that he was choosing Dr. Davis as his physician?
>
> A. No, sir.
>
> Q. Did you ask anything about —
>
> A. Yes, I did. I asked afterwards. Mr. Charles Fortenberry particularly looked at it. He was sitting behind the desk, and I said, what happens if we decide to choose our own doctor if we don't want to see Dr. Davis. And he said, you can do so; you can choose your own doctor.

Further, even though Claimant and his wife testified that they recalled Claimant signing only two forms, the accident report and the release of medical information, Claimant actually signed three forms, the accident report, the release of information, and the choice of physician form. (Transcript, p165, line 11 -p. 166, line 11.)

2) Likewise, Claimant's testimony as to why he discontinued treatment with Dr. Sweeney was also inconsistent. Claimant testified on direct examination that he discontinued treatment with Dr. Sweeney and began treatment with Dr. Kinnard "when Dr. Davis had told me that I had a bruise on my back and that it went away. . . . That's when I really decided I was going to go to my very own doctor." He added that he wanted to go see Dr. Kinnard because Dr. Kinnard had seen him previously and he felt comfortable with Dr. Kinnard. (Transcript, p. 55, lines 5-13.).

However, on cross-examination, Claimant admitted that he did not feel uncomfortable with Dr. Sweeney and that he was agreeable with the referral to Dr. Sweeney because Dr. Sweeney was an expert in his field. (Transcript, p. 89, lines 8-16.) When questioned further about his decision not to return to Dr. Sweeney, and why did he did not continue with his physical therapy as ordered by Drs. Davis/Sweeney, especially when he was experiencing improvement, Claimant contradicted himself saying that he didn't feel comfortable with Dr. Sweeney apparently because Dr. Sweeney and Davis were in the same office.[(Tr. 99).]

. . .

3) Claimant stated that he did not return to the physical therapy prescribed by Drs. Davis/Sweeney because "if therapy was hurting me more, I wasn't going to go back," (Transcript, p.99, in. 3-12.) Claimant testified, however, that although the subsequent physical therapy that was prescribed by Dr. Kinnard also aggravated his condition, he did not tell that physical therapist that the physical therapy complaints were aggravating his condition because "he thought it was just normal that you hurt after all this." (Transcript, p. 130, in. 4-7.) And, although Claimant also claims stated (sic) that he told the therapist after the first visit that the therapy treatments were aggravating his condition, the physical therapy records note that Claimant tolerated the therapy well. (Joint Ex. 11.)

4) Claimant testified that the pain in his legs keeps him from walking (Transcript, p. 91, ln. 1-5), that he can't walk 50% of the time, (Transcript, p. 92, and p. 113), and that he can't walk return to his former employment because he has to

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(Tr. 162).

walk 500 feet each way to get materials. (Transcript, p. 139, lines 4-16.) This is not only inconsistent with the functional capacity evaluation that concludes that Claimant can engage in frequent walking, but is contradictory to Dr. Kinnard's testimony that there is no neurological basis to preclude Claimant from walking 50% of the time, as well as Claimant's own testimony that during the FCE he was able to walk eight minutes at one mile per hour. (Transcript, p. 139, lines 7-8.)

5) According to Claimant, at the current time, he has good days and bad days; half of the days are good and half are bad. (Transcript, p. 133, lines 10-16.) He testified that on good days, he is able to do some housework, including washing dishes, washing clothes, and cooking supper. Claimant said that on good days, he is only able to stand for 15-20 minutes in one position. (Transcript, p. 67, lines 25 - p. 69, lines 12.) On bad days, Claimant maintains that all he can do is lay around the house, watch television, and sleep. (Transcript, p. 69, lines 18-24.) Nevertheless, Claimant believes that he is able to return to some type of employment, (Transcript, p. 72, in. 15-17) and also claims that he is able to manage his pain with nothing more than Extra Strength Tylenol during the day and Tylenol PM at night. (Transcript, p. 70, lines 2-4).

6) Claimant testified that he was unable to return to light duty work at the time he was treating with Dr. Davis because of his severe back and leg pain and because he "couldn't really hardly get around much." (p. 36, In. 1-16.) Contrary to this allegation, Dr. Davis made a specific note on May 1, 2001 that he had observed that Claimant was able to move about the office without any evidence of discomfort. (Joint Ex. 20, p. 25, ln. 24 - p. 26, in. 12.)

(Employer's Br. at 27-31).

Of the above examples illustrated by Employer, I do not find that Claimant's confusion about the form he signed in Employer's office or the circumstances surrounding the choice of physician issue adversely affects Claimant's credibility. Regarding the subjective element to Claimant's pain, however, I find that Claimant is not a credible witness. Claimant offered no satisfactory testimony to explain why he discontinued physical therapy after he reported to Dr. Sweeney on May 1, 2001 that it had resolved about twenty-percent of his pain. (JX 6, p. 1). Dr. Davis noted that it was odd that Claimant was able to move from the chair to the table without a problem when his patients with acute lumbar problems could not do so in a like manner. (JX 20, p. 25-26). Dr. Sweeney reported that Claimant's subjective reports of pain were not explained by his objective pathology. (JX 6, p. 2). Dr. Kinnard opined that Claimant's subjective reports of pain were out of proportion with his minimal physical findings. (JX 22, p. 41-42). Additionally, Dr. Kinnard stated that Claimant's condition (assuming he suffered from nerve irritation) should resolve over time, but Claimant had not made any such progress. (JX 7, p. 20). Given the inconsistencies noted by Employer, Claimant minimal objective findings, and the opinions of Drs. Davis, Sweeney, and Kinnard, I do not credit Claimant's subjective report of pain.

C. Causation of the Increase in Claimant's Protruding Disc

In establishing a causal connection between the injury and a claimant's work, all factual doubts must be resolved in favor of the claimant. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2001). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2001). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999); 5 U.S.C. 556(d) (2001).

Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom., Gardner v. Director*, OWCP, 640 F.2d 1385 (1st Cir. 1981).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the

relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physicians opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also*, *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

In this case, the parties do not dispute that Claimant suffered a workplace fall on April 17, 2001, during which Claimant injured his back. Dr. Sweeney opined that Claimant May, 2001, MRI did not show any difference from Claimant's August, 1996, MRI when accounting for a difference in technique. (JX 6, p. 1). Dr. Davis opined that the increase in the size of Claimant's protruding disc was due to the natural degenerative process of Claimant's desiccated disc. (JX 20, p. 24-25). Dr. Kinnard acknowledged that the enlargement of Claimant's protruding disc could be due to natural progression, but it could also be due to an aggravation of Claimant's pre-existing condition, and since Claimant became symptomatic after his workplace injury, Dr. Kinnard attributed the increase in the

disc protrusion to Claimant's injury, and stated that attributing the increase in disc size to different MRI techniques was "grasping at straws." (JX 22, p. 21-22, 31). Dr. Donner opined that Claimant's workplace fall would not likely aggravate his pre-existing condition , but he acknowledged that Claimant's pain complaints did not start until his workplace accident. (EX 3, p. 21, 25).

Aided by the Section 20 presumption, 33 U.S.C. § 920(a), I find that Claimant established a *prima facie* case that his April 17, 2001 workplace accident caused an increase in his disc protrusion as demonstrated on his May, 2001, MRI and as stated in the testimony of Dr. Kinnard. I also find that Employer presented substantial evidence to rebut his presumption when it produced the testimony of Drs. Sweeney, Davis, and Donner, who opined that Claimant's increased disc protrusion could be due to factors unrelated to Claimant's workplace accident. Considering the record as a whole, I find that Claimant's workplace accident aggravated his underlying condition based on the fact that: 1) Claimant's protruding disc was larger in May, 2001, than in August, 1996; 2) Claimant was asymptomatic prior to his workplace accident; 3) Claimant suffered a lumbar contusion when he fell; and 4) based on the fact that all physicians agree that Claimant's bulging and protruding discs are a legitimate source for Claimant's complaints of back pain which originated at the time of his accident.

D. Nature and Extent of Disability and Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2nd Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

D(1) Nature of Claimant's Injury

On April 17, 2001, Claimant presented to TGMC complaining of low back and lower extremity pain after suffering a slip and fall accident at work. (JX 4, p. 94). Claimant was assessed as having a contusion to his coccyx and lower back. *Id*. at 97. X-rays demonstrated normal findings for Claimant's lumbar spine and normal findings for his sacrum and coccyx. *Id*. at 99.

On April 20, 2001, Dr. Davis diagnosed low back pain as part of a contusion injury, and directed that Claimant undergo physical therapy. (JX 5, p. 3-4). On May 1, 2001, Claimant returned to TGMC continuing to complain of lumbar pain, and hospital staff assessed Claimant as having a lumbar contusion/spasm. (JX 4, p. 103). An MRI of his lumbar spine demonstrated: a central disc protrusion at L3-4 which was slightly increased in comparison with his August 7, 1996 MRI; and an annular bulge that was unchanged from his earlier MRI. *Id*. at 106. Reviewing Claimant MRI, Dr. Davis noted that there was disc degeneration and desiccation, but no evidence of any significant spinal stenosis or neuroforminal impingement. (JX 5, p. 5). Dr. Davis opined that Claimant's back pain was likely muscular in origin. (JX 20, p. 24-25). On May 3, 2001, Dr. Sweeney diagnosed subjective back pain and recommended further physical therapy. (JX 6, p. 1).

On April 30, 2001, and again on June 13, 2001, Claimant filled out a pain diagram for Dr. Kinnard, and after reviewing Claimant's two pain pattern diagrams, Dr. Kinnard stated that the diagrams reflected a nerve root irritation. (JX 22, p. 17-18). On June 13, 2001, Dr. Kinnard, concluded that Claimant suffered from an aggravation of a pre-existing condition as well as a worsening of that condition in his lower back. (JX 7, p. 14). Typically, a nerve root irritation would resolve over time. *Id*. at 20. Also, Dr. Kinnard testified that Claimant's somatic nerve irritation would not actually cause his legs to go numb or his knees to go weak because Claimant did not have a true neurologic injury. (CX 5, p. 25). Rather, Dr. Kinnard attributed that complaint to a reflexive response to a painful stimuli. *Id*. Likewise, Claimant had no radicular referral of pain from his back, but Claimant did have a somatic referral from a vague nerve irritation. *Id*. at 28. Somatic referral was pain, and Dr. Kinnard would not expect to see any outward physical findings. *Id*. at 34.

On January 7, 2002, Dr. Donner assessed chronic lumbar pain of an unknown etiology. (JX 8, p. 4). Dr. Donner stated that he had no further treatment to offer Claimant. *Id*. Dr. Donner explained that Claimant did not have a lumbar lesion that compressed his nerve to cause radicular symptoms. (EX 3, p. 11). Claimant did not have lumbar stenosis. *Id*. Likewise, Claimant's pain was not likely referred because symptoms of leg weakness and numbness did not fit with Claimant's situation. *Id*. at 11-12. There was no way to equate any radicular symptoms in Claimant to the disc bulge apparent on his MRI. *Id*. at 12. Regarding the theory that Claimant could suffer from generalized nerve irritation, Dr. Donner stated that it was possible but he did not think it could occur as a result of Claimant's fall. *Id*. at 13. Regarding Claimant workplace fall aggravating a pre-existing condition, Dr. Donner stated that bulging discs in general were a normal variant and he would not expect a fall to aggravate a bulging disc. (EX 3, p. 21).

On September 11, 2002, Dr. Sweeney re-evaluated Claimant after reviewing the records of Dr. Kinnard and records from Claimant's three epidural steroid injections. (JX 6, p. 2). Dr. Sweeney's opined that Claimant suffered from back pain, recalcitrant and chronic, which was secondary to degenerative disc disease. *Id*. at 4. In his opinion, Claimant's subjective reports of pain were not explained by his objective pathology. *Id*. Although Claimant's lumbar disc pathology could explain his back pain, Claimant's subjective complains abut leg pain were simply without an explanation. (JX 6, p. 2; JX 21, p. 20-21). There was no orthopaedic condition related to his workplace accident that needed further diagnostic treatment or testing. (JX 6, p. 5). Dr. Sweeney did not feel that Claimant suffered for a general nerve irritation as explained by Dr. Kinnard. (JX 21, p. 28). Specifically, the MRI findings did not show any contact or physical compression of the nerve roots, Dr. Sweeney's two physical examinations did not reveal any findings consistent with irritated nerves or nerves in tension, and Claimant's subjective history of complaints was too persistent to indicate general nerve irritation. *Id*. at 39-40. Also, if Claimant truly had radicular complaints, such as buckling knees, Dr. Sweeney testified that he would have expected to see some asymmetry in the thighs and calves as well as positive tension, reflex and neurological signs. *Id*. at 40.

On May 1, 2002, Dr. Kinnard noted that Claimant continued to report significant pain despite minimal physical findings and minimal MRI findings. (JX 7, p. 30). Dr. Kinnard felt that Claimant had chronic lumbar pain from a questionable origin, and he stated that he had nothing further to offer Claimant in the way of treatment. *Id*. Dr. Kinnard also testified that Claimant's subjective reports of pain were out of proportion to his minimal physical findings, and he explained that Claimant's symptoms were a combination of lumbar disc disease, an L-3 disc protrusion, and a chronic lumbar strain, all of which could cause Claimant's nerve root irritation. (JX 22, p. 41-42). Dr. Kinnard did not attribute the increase in Claimant's pretruding disc to a difference in the techniques used in Claimant's 1996 and 2001 MRI scans, and he did not think that the technique used in taking the MRIs accounted for the slight increase in Claimant's protruding disc. *Id*. Dr. Kinnard opined that the source of Claimant's pain was both an aggravation of a pre-existing condition and a slight increase in a protruding disc caused by Claimant's workplace fall. *Id*. at 31.

D(1)(a) Resolving the Conflict Among Claimant's Physicians Regarding the Nature of His Injury

No physician contests the fact that Claimant fell at work and suffered a lumbar contusion injury. Likewise, no physician contests that Claimant does not have a spinal lesion, radicular symptoms, or a neurologic component to his pain. All physicians agree that Claimant's subjective pain complaints are out of proportion to his minimal physical findings. As determined *supra*, Section IV, Part C, I find that Claimant's workplace accident also caused an increase in the size of his protruding disc, and as a result, Claimant suffers from some degree of back pain.

Rather, the dispute between physicians concerns the etiology of Claimant's lower extremity pain, if any. Dr. Davis opined that Claimant's pain was muscular in origin. (JX 20, p. 24-25). Dr. Sweeney opined that Claimant did not have any lower extremity pain at all as there was simply no explanation for his complaints. (JX 6, p. 2). Dr. Donner opined that there was not any referred pain into Claimant's legs because symptoms of leg weakness and numbness did not fit with Claimant's situation. (EX 3, p. 11-12). Dr. Kinnard, however, stated that Claimant had somatic nerve irritation that created a reflexive response in Claimant's lower extremities to the painful stimuli. (CX 5, p. 25). Dr. Kinnard further explained that somatic referral from a vague nerve irritation was real pain, and such a diagnosis would explain why Claimant did not exhibit outward physical findings such as asymmetry in the thighs. *Id*. at 28, 34. Dr. Kinnard believed Claimant's subjective reports of pain and his diagnosis was based on those reports rather than diagnostic testing. (JX 22, p. 47).

Dr. Sweeney did not feel that Claimant suffered for a general nerve irritation as explained by Dr. Kinnard. (JX 21, p. 28). Specifically, the MRI findings did not show any contact or physical compression of the nerve roots, Dr. Sweeney's two physical examinations did not reveal any findings consistent with irritated nerves or nerves in tension, and Claimant's subjective history of complaints was too persistent to indicate general nerve irritation. *Id*. at 39-40. Regarding the theory that Claimant could suffer from generalized nerve irritation, Dr. Donner stated:

> What, some evil pixie came and waved dust over him and - - it is possible. I suppose it's possible that you could have some sort of neurotic syndrome that's not related to any kind of, you know, lesion in the spine; and some people do develop fairly painful neuropathies, but you are not going to describe the onset of that during a fall. So to say that's the etiology of his leg pain, you know, isn't - - I don't think that's a valid argument to me.

(EX 3, p. 13).

As determined *supra*, Section IV, Part B, I do not credit Claimant's subjective reports of pain. As such I do not credit the diagnosis of Dr. Kinnard who specifically stated that his diagnosis for nerve irritation causing lower extremity pain was based on Claimant's subjective reports. (JX 22, p. 41-42). Accordingly, I find that following Claimant's April 17, 2001 workplace accident he suffered an injury and the nature of that injury was a contusion to the lower back and coccyx, which resulted in a slightly larger disc protrusion at L3-4, and lumbar pain.

D(2) Extent of Claimant's Injury

On April 20, 2001, Dr. Davis diagnosed Claimant as having low back pain as part of a contusion injury, and limited Claimant to sedentary duty. (JX 5, p. 3). On April 26, 2001, Claimant continued to complain of pain, and Dr. Davis limited Claimant to light duty status until he could

reevaluate Claimant after completion of his MRI. *Id*. at 4. On May 1, 2001, Dr. Davis recommended continued physical therapy, he referred Claimant to Dr. Sweeney, and he maintained Claimant's light duty status. (JX 5, p. 5). On May 3, 2001, Dr. Sweeney diagnosed subjective back pain, recommended further physical therapy, and limited Claimant to light duty work. (JX 6, p. 6).

On June 13, 2001, Dr. Kinnard opined that Claimant was suffering from nerve root irritation. (JX 22, p. 17-18). Pain associated with nerve root irritation would vary from day to day. *Id*. at 18. Also, Dr. Kinnard testified that Claimant's somatic nerve irritation would not actually cause his legs to go numb or his knees to go weak because Claimant did not have a true neurologic injury. (CX 5, p. 25). Rather, Dr. Kinnard attributed that complaint to a reflexive response to a painful stimuli. *Id*. In regards to further treatment, Dr. Kinnard recommended an epidural steroid injection to see if it decreased Claimant's level of pain. *Id*. Until the shot could be administered, Dr. Kinnard recommended that Claimant not return to work. *Id*.

On July 30, 2001, Claimant presented for physical therapy complaining about lower back and bilateral leg pain. (JX 13, p. 2). Claimant rated his subjective pain between six and eight on a ten point scale, and his evaluator assessed disc problems causing radiculopathy and low back pain. *Id*. On January 17, 2002, Claimant returned to physical therapy, rating his subjective pain as between four and nine on a ten point scale. *Id*. at 7. Claimant related his leg pains extended down to his feet, and he stated that he was unable to stand more than five minutes without having to change positions. *Id*. Claimant also reported that his knees would buckle causing him to fall. *Id*. Claimant's evaluator assessed lumbar disc pain persisting for nine months. *Id*.

On November 14, 2001, Dr. Kinnard wrote to Claimant that he had not seen him for treatment since July 26, 2001, and he could not justify keeping Claimant in a no-work status. (JX 7, p. 19). Thus, Claimant presented for treatment on November 29, 2001 and continued to complain of low back pain that was referred into both legs. *Id*. at 20. Dr. Kinnard repeated his recommendation that Claimant not return to work. *Id*. at 20. Dr. Kinnard testified that his continuing no-work recommendation was based on Claimant's subjective reports of pain. (JX 22, p. 39).

On January 7, 2002, Dr. Donner opined that Claimant suffered from chronic lumbar pain of an unknown etiology. (JX 8, p. 5). Dr. Donner opined that Dr. Kinnard's treatment was appropriate, and that he had nothing further to offer Claimant that Dr. Kinnard had not already attempted. *Id*. Accordingly, Dr. Donner referred Claimant to a pain management specialist for an opinion. *Id*. Reviewing Claimant's January, 2003, functional capacity evaluation, Dr. Donner thought that it reflected an ability to perform work above a sedentary level. (EX 3, p. 31).

On May 1, 2002, Dr. Kinnard noted that Claimant continued to report significant pain despite minimal physical findings and minimal MRI findings. (JX 7, p. 30). Dr. Kinnard felt that Claimant had chronic lumbar pain from a questionable origin, and because he had nothing further to offer

Claimant in the way of treatment, Dr. Kinnard stated that Claimant had reached maximum medical improvement with a five-percent whole body impairment. *Id*. Dr. Kinnard issued permanent work restrictions in the sedentary/light category. *Id*. On January 22, 2003, Dr. Kinnard repeated his opinion that Claimant had a five percent permanent partial impairment rating to the body as a whole. (CX 4, p. 1). Dr. Kinnard also testified that Claimant's subjective reports of pain were out of proportion to his minimal physical findings, and he explained that Claimant's symptoms were a combination of lumbar disc disease, an L-3 disc protrusion, and a chronic lumbar strain, all of which could cause Claimant's nerve root irritation. (JX 22, p. 41-42). The sedentary/light work restrictions Dr. Kinnard set were based on Claimant's pain complaints. *Id*. at 47.

Reviewing Claimant functional capacity evaluation Dr. Kinnard stated that his sedentary/light work restrictions were consistent with the result of the functional capacity evaluation, and he did not think it was appropriate for him to further limit Claimant's work restrictions to sedentary only. (CX 5, p. 8). Dr. Kinnard did not agree with the recommendation that Claimant could perform continuous crawling, sitting, upper extremity coordination and elevated work, and he stated that he would restrict those activities more. *Id*. at 12. Likewise, Dr. Kinnard would not recommend that Claimant engage in frequent forward bending, sitting, kneeling, balancing, rotation of sitting, standing, and walking, such that Claimant should not engage in any continuous or frequent activity, but Claimant could engage in those activities occasionally. *Id*. at 13-14. Dr. Kinnard stated that he would restrict Claimant's lifting to twenty-five to thirty pounds on a regular basis, and an ideal job would allow for alternating sitting, standing, and walking. *Id*. at 34-35.

On September 11, 2002, Dr. Sweeney re-evaluated Claimant after reviewing the records of Dr. Kinnard and records from Claimant's three epidural steroid injections. (JX 6, p. 2). In his opinion, Claimant's subjective reports of pain were not explained by his objective pathology, which in fact did not exist at all in relation to his April 17, 2001 workplace accident. *Id*. Claimant's subjective complains were simply without an explanation. *Id*. Dr. Sweeney concluded to a reasonable degree of medical probability that Claimant did not suffer from any permanent injury related to his April 17, 2001 workplace accident. *Id*. Dr. Sweeney found no reason why Claimant could not resume his pre-injury occupation. *Id*. Reasonable restrictions based on the two degenerative discs present in Claimant's MRI would include no heavy, or very heavy, repetitive lifting (100 lbs lift, 50 lbs carry). (JX 6, p. 2; JX 21, p. 23). There was no orthopaedic condition related to his workplace accident that needed further diagnostic treatment or testing. (JX 6, p. 5).

Claimant underwent a functional capacity evaluation on January 20 & 22, 2003, in which he gave a maximum voluntary effort and he did not exhibit signs of symptom magnification. (JX 9, p. 1). Claimant exhibited the ability to function on a sedentary physical demand level and his body mechanics were appropriate. *Id*. Mr. Naquin summarized Claimant's functional capacities as follows:

> This client could return to sedentary level work activity. This client could perform continuous crawling, sitting, UE coordination, and elevated work. This client could

perform frequent forward bending in sitting, kneeling, balance, rotation in sitting, standing and walking. This client would be limited to occasional repetitive squatting, ladder and stair climbing, forward bending in standing, crouching, and standing tolerance.

(JX 9, p. 1).

D(2)(a) Resolving the Conflict Among Physicians Regarding the Extent of Claimant's Injury

As noted *supra*, Section IV, Parts B & D(1), I find that Claimant's reports of subjective pain are not reliable, and I do not credit the opinion of Dr. Kinnard that Claimant suffers from nerve root irritation. Because I found that the nature of Claimant's injury was a contusion to the lower back and coccyx which resulted in two symptomatic lumbar discs causing back pain, I do not credit the recommendations of Dr. Kinnard that Claimant is totally disabled secondary to nerve root irritation.

Regarding Claimant's functional capacity exam which recommended that Claimant could only perform sedentary work activity,[5] I find that Claimant is capable of performing work above a

[5] Sedentary Work is defined as: "Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991).

Light Work is defined as: "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible." *Id*.

sedentary level. Claimant's exam was internally consistent over two days of testing, and Claimant's heart rate increased appropriately with the onset of pain. (JX 9, p. 3). I note that Claimant does suffer from a degree of back pain associated with his lumbar discs and that the objective confirmation of Claimant's subjective complaints, such as an increased heart rate, are attributable to his lumbar pain. Dr. Kinnard, who set physical limitations based on the assumption that Claimant had nerve root irritation, stated that the limitations in the functional capacity exam were too restrictive in that Claimant had the ability to perform heavier lifting. (CX 5, p. 34-35). Similarly, Dr. Donner opined that the findings in the functional capacity examination reflected the ability to perform work above a sedentary level. (EX 4, p. 31).

In light of the limits set by Claimant's functional capacity evaluation, the functional limits set by Drs. Kinnard and Sweeney, the statement by Dr. Donner that he felt the results of the functional capacity evaluation reflected an ability to perform more than sedentary work, and my determination that Claimant does not suffer from nerve root irritation, I find that Claimant is capable of performing medium level work. Dr. Sweeney set permanent restrictions that Claimant not engage in heavy lifting (i.e., Claimant was capable of engaging in medium level lifting), based on Claimant's bulging and protruding discs.

As established by Dr. Davis, I find that Claimant could return to sedentary duty on April 20, 2001, and that he could return to light duty on April 26, 2001. Claimant's light duty restrictions were continued by Dr. Sweeney on May 3, 2001, and on that date Dr. Sweeney recommended Claimant continue physical therapy and return in two weeks for an appointment. Claimant never appeared for his follow-up appointment on account of the fact that he chose to see Dr. Kinnard for further treatment. Under Dr. Kinnard's care, Claimant underwent a series of epidural steroid blocks, and a course of physical therapy. When Dr. Kinnard recommended four weeks of physical therapy on July 26, 2001, he did so with the intention of rehabilitating and reconditioning Claimant's muscles so that Claimant could return to work. I find that after the four weeks of physical therapy recommended by

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Medium Work is defined as: "Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work." *Id*.

Heavy Work is defined as: "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work." *Id*.

Very Heavy Work is defined as: "Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work" *Id*.

Dr. Kinnard, Claimant was able to return to work on August 27, 2001, with restrictions of no work above a medium level of exertion.

D(3) Maximum Medical Improvement

On May 1, 2002, Dr. Kinnard felt that Claimant had chronic lumbar pain from a questionable origin, and because he had nothing further to offer Claimant in the way of treatment, Dr. Kinnard stated that Claimant had reached maximum medical improvement with a five percent whole body impairment. (JX 7, p. 30). As noted *supra*, Section IV, Part D(1), I do not credit Dr. Kinnard's diagnosis of nerve root irritation, and as such I do not credit his recommended date for maximum medical improvement. On September 11, 2002, Dr. Sweeney opined that Claimant had reached maximum medical improvement over a year ago based on his recalcitrant and chronic back pain. (JX 6, p. 4). There was no orthopaedic condition related to his workplace accident that needed further diagnostic treatment or testing. *Id*. at 5. Likewise, Dr. Donner had stated on January 11, 2002, that he had nothing further to offer Claimant in the way of treatment after reviewing Claimant's medical history. (JX 8, p. 4).

Having determined that the nature of Claimant's injury was two symptomatic lumbar discs that do not require surgical intervention, I find that Claimant reached maximum medical improvement on August 27, 2001. On July 26, 2001, Dr. Kinnard had reviewed the results from Claimant's epidural steroid shots and referred Claimant to Dr. Donner for a second opinion. (JX 7, p. 16). Dr. Kinnard also recommended further physical therapy in an effort to rehabilitate Claimant's muscles and to condition them so that Claimant could return to work.[6] *Id*. After Claimant's physical therapy ended, he did not return to see Dr. Kinnard until November 29, 2001, and he only returned at that time because Dr. Kinnard refused to authorize another no work slip unless he could evaluate Claimant's condition. (JX 22, p. 34-35). Accordingly, I find that by August 27, 2001, Claimant was not longer undergoing treatment with a view toward improvement because by that date Claimant had undergone conservative treatment, a course of epidural steroid blocks, physical therapy, and August 27, 2001, fairly coincides with Dr. Sweeney's opinion that Claimant had reached maximum medical improvement with regards to his symptomatic lumbar discs over a year prior to his September 11, 2002 evaluation of Claimant.

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[6] Regarding his recommendations for physical therapy, Dr. Kinnard stated that it was a local modality to make a patient feel good in an attempt to buy time while the body healed itself. (JX 22, p. 28). After a patient's symptoms decrease, physical therapy was necessary to recondition muscles. *Id*. at 29. Physical therapy did not address nerve root irritation, but was merely an attempt to treat the symptom and make it feel better. *Id*. If a patient did not feel better with physical therapy, then Dr. Kinnard stated that he would not recommend it. *Id*. When Dr. Kinnard recommended additional physical therapy on July 26, 2001, he was attempting not only to relieve Claimant's symptoms but he wanted to rehabilitate Claimant's muscles and condition them to a point where Claimant could return to work.

E. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

E(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Ms. Syler classified Claimant's job as a carpenter as medium level work. (Tr. 201). Claimant testified that his former job entailed lifting up to eighty pounds. (Tr. 26). I find that Claimant's former position exceeds his sedentary and light level work restrictions set by Drs. Davis, Sweeney and Kinnard from April 17, 2001 to August 27, 2001, thus, Claimant established a *prima facie* case of total disability following his April 17, 2001 workplace accident.

E(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do

> following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

E(2)(a) Claimant's Age, Background, Experience, and Physical Limitations

Claimant was born in 1964, has an eighth grade education, and is a lifelong resident of Terrebonne Parish. (Tr. 22-24). After leaving school, Claimant began working for his father as a carpenter, and he performed carpentry for twenty years before being hired by Employer as a carpenter. (Tr. 24). Claimant's job entailed carrying tools to a vessel, obtaining materials from the yard, performing framing, building cabinets, bunk beds, pantries, hanging ceilings, and other types of general carpentry work. (Tr. 26). In vocational testing, Ms. Syler noted that Claimant learned how to read blue prints and was capable of ordering materials and performing rough estimates on the amount of material needed for a task. (JX 10, p. 2). Claimant demonstrated the ability to identify words at a 7.5 grade equivalency, comprehend passages at a 5.1 grade equivalency, and to perform calculation at a 5.7 grade equivalency. *Id*. at 3.

After suffering for a workplace injury on April 17, 2001, Claimant suffered from a contusion to the lower back and coccyx, which resulted in a slightly larger disc protrusion at L3-4, and lumbar pain. The extent of that injury rendered Claimant temporarily totally disabled from April 17, 2001 to April 20, 2001; rendered him capable of sedentary work from April 21, 2001 to April 26, 2001; rendered him capable of light duty work from April 27, 2001 to August 27, 2001, and thereafter rendered him capable of medium level work.

In this case, Employer offered, and Claimant acknowledged that Employer had light duty work available in the tool room at his same hourly rate of pay. (Tr. 89-90). Claimant did not think that he could perform the work because of pain associated with handing out tools to other yard workers which entailed standing, twisting, bending, and squatting. (Tr. 90). Claimant never even attempted to perform the work. (Tr. 90). In fact, Claimant's functional capacity evaluation stated that Claimant could perform occasional standing, squatting and crouching. (JX 9, p. 1). No showing was made that Claimant's light duty job would entail fewer hours or a loss of wage earning capacity. Therefore, I find that Employer offered Claimant suitable alternative work within its facility beginning

April 27, 2001, that day Dr. Davis released Claimant to light duty work, and I find that Claimant could resume his former job on August 27, 2001.

F. Choice of Physician

In general, an employer whose worker was injured on the job is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). An employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b) (2002). When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2) (2002); 20 C.F.R. § 702.406(a) (2001); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent. 33 U.S.C. 907(c)(2) (2001). "In all other case, consent may be given upon a showing of good cause for change." *Id*. When requesting a change of physicians in non-emergency cases, the regulations provide:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

20 C.F.R. § 702.406(a) (2001).

In this case, Claimant was treated on April 20, 26, and May 1, 2001, by Dr. Davis following his April 17, 2001 accident. (JX 5, p. 3-5). On April 20, 2001, Claimant appeared for a meeting with Employer's representatives during which time he signed an accident report, a medical authorization and a choice of physician form. (JX 3, p. 1; EX 1, p. 1; EX 2, p. 1). The choice of physician form listed Dr. Davis as Claimant's choice of physicians. (JX 3, p. 1).

Claimant acknowledged that he signed some paperwork at the meeting with Employer on April 20, 2001. (Tr. 40-41). Prior to that meeting, Claimant had presented to his appointment with Dr. Davis because he needed treatment and he did not have any other physician in mind at the time. (Tr. 84, 88). Claimant testified that he had no idea that he signed a choice of physician form naming Dr. Davis as his treating physician during his meeting with Employer. (Tr. 42). Ms. LeCompte, who

accompanied Claimant to the meeting specifically asked Mr. Fortenberry what would happen if Claimant chose to see his own doctor other than Dr. Davis, and Ms. LeCompte understood that Claimant could choose another physician if he desired. (Tr. 162). Ms. LeCompte stated:

> I asked afterwards, Mr. Charles Fortenberry particularly looked at it. He was sitting behind the desk, and I said, What happens if we decide to choose our own doctor if we don't want to see Dr. Davis? And he said, You can do so; you can chose your own doctor. . . . They told me that we could see another doctor if we preferred.

(Tr. 162-63).[7]

Pursuant to Dr. Davis' instructions, Claimant returned for treatment on April 26, 2001, and on May 1, 2001, without asserting his right to chose another physician. (JX 5, p. 4-5). Claimant was agreeable to Dr. Davis' referral to Dr. Sweeney because Dr. Sweeney was an orthopaedic specialist. (Tr. 89). After seeing Dr. Davis and Dr. Sweeney, Claimant decided that he needed to see his "own" doctor, because on the date of his last visit Dr. Davis told him his bruise had cleared up and resolved. (Tr. 52). Claimant stated that he had never suffered from a bruise and he did not know that Dr. Davis was referring to an internal bruise as opposed to a black and blue bruise. (Tr. 52). This event caused Claimant to lose all confidence in Dr. Davis. (Tr. 52). Claimant also decided that he did not feel comfortable seeing Dr. Sweeney because he was in the same office suite as Dr. Davis, and he felt they were too closely associated. (Tr. 99). Instead, Claimant chose to see Dr. Kinnard because Dr. Kinnard had treated him on prior occasions. (Tr. 55).

Based on the record, I find that Claimant never selected Dr. Davis as his choice of physician. Claimant has a limited education, both Claimant and Ms. LeCompte testified that they did not know Claimant was signing a choice of physician form, and Employer told Claimant simultaneously that he had the right to go to a physician of his choice. Thus, the basic elements of estoppel are present in this case, which is that Claimant was lulled into a false sense of security by Mr. Fortenberry's assertions thereby depriving Claimant of a legal right which he could have exercised had he known Employer's true position in the matter. In essence, I find that Employer cannot avail itself of the rules and regulations regarding the ramifications associated with signing a choice of physician form while simultaneously leading an injured worker to believe he could see a physician of his choosing.

G. Outstanding Medical Bills

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2002). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

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[7] I gave Employer's counsel the opportunity to depose Mr. Fortenberry post-hearing, but counsel did not elect to do so. (Tr. 188).

Claimant seeks payment for the following unpaid medical bills: TGMC - $600.46, for services rendered on May 21, 2001; Eckard Drug Prescription Costs totaling $88.49; and a $15.00 co-payment made to Dr. Donner for his January 7, 2002 office consultation. (CX 1-3). Claimant's May 21, 2001 treatment at TGMC was in relation to ongoing symptoms and "new symptoms" of lower back pain related to Claimant's workplace injury. (JX 4, p. 109). As such I find Claimant's visit to the emergency room due to "new symptoms" originating from his workplace injury is a compensable expense. Likewise, I find that the drugs prescribed by Drs. Davis and Kinnard are related to Claimant's workplace injury and are compensable. Claimant also seeks reimbursement for Ultram, prescribed by Dr. Guidry on August 31, 2001. (CX 2, p. 1). Dr. Guidry treated Claimant for lumps on his chest and was not associated in treating Claimant for his workplace accident. (JX 17). As such the cost of medication prescribed by Dr. Guidry ($15.00) is not compensable. Claimant's $15.00 payment to Dr. Donner for his January 7, 2002 evaluation was related to a neurosurgical referral from Dr. Kinnard, and was directly related to treatment for Claimant's workplace injury. (CX 3). As such I find that Claimant is entitled to reimbursement for that payment. Accordingly, I find that Employer must reimburse/pay the $600.46 bill from TGMC, $73.49 in prescription costs, and the $15.00 Claimant paid for his evaluation by Dr. Donner.

H. Conclusion

Given the inconsistencies noted by Employer, Claimant minimal objective findings, and the opinions of Drs. Davis, Sweeney, and Kinnard, I do not credit Claimant's subjective report of pain. I find that Claimant's workplace accident aggravated an underlying lumbar condition based on the fact that: 1) Claimant's protruding disc was larger in May 2001 than in August 1996; 2) Claimant was asymptomatic prior to his workplace accident; 3) Claimant suffered a lumbar contusion when he fell; and 4) based on the fact that all physicians agree that Claimant's bulging and protruding discs are a legitimate source for Claimant's complaints of back pain which originated at the time of his accident. The nature of that injury consisted of a contusion to the lower back and coccyx, which resulted in a slightly larger disc protrusion at L3-4, and lumbar pain. Following his workplace injury, Claimant was able to return to sedentary duty on April 20, 2001, and he could return to light duty on April 26, 2001. Claimant's light duty restrictions continued to August 27, 2001, the date Claimant reached maximum medical improvement, with permanent restrictions that Claimant not perform work above a medium level of exertion. Because Employer offered light duty employment within its facility on April 27, 2001, at the same rate of pay, Claimant failed to show a loss of wage earning capacity. Finally, Claimant chose Dr. Kinnard as his treating physician, and Employer is responsible for paying Claimant's outstanding medical costs from TGMC, Dr. Donner and for $73.49 in prescription medication.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts

have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability benefits pursuant to 33 U.S.C. § 908(b) of the Act, for the period of April 18, 2001 to April 26, 2001, based on an average weekly wage of $716.40, and a corresponding compensation rate of $477.60.

2. Employer shall be entitled to a credit for all compensation paid to Claimant after April 17, 2001.

3. Employer shall pay/reimburse for the $600.46 bill from TGMC, $73.49 in prescription costs, and the $15.00 Claimant paid for his evaluation by Dr. Donner. Employer shall also pay for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge